

SECTION CHAIR
Randolph J. May
The Progress and Freedom
Foundation
(202) 289-8928
FAX: (202) 28960791
Email rmay@pff.org

AMERICAN BAR ASSOCIATION

**Section of Administrative Law &
Regulatory Practice**
740 15th Street, NW
Washington, DC 20005

June 3, 2005

The Honorable Jo Anne B. Barnhart
Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703.

Re: Notice of Proposed Rulemaking on Supplemental Standards of Ethical Conduct for
Employees of the Social Security Administration, 70 FR 7195 (Feb. 11, 2005)

Dear Commissioner Barnhart:

On behalf of the Section of Administrative Law and Regulatory Practice of the American Bar Association (the "Section"), I am submitting comments on the Social Security Administration's Notice of Proposed Rulemaking on Supplemental Standards of Ethical Conduct for Employees of the Social Security Administration, 70 Fed. Reg. 7195 (Feb. 11, 2005) and on which SSA reopened the comment period in May 2005. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Our Section consists of attorneys in private practice, government service and legal education, as well as judges. The Section's governing council and the pertinent substantive committees each have members representing these segments to ensure that all points of view are considered. By presenting their consensus views, the Section seeks to improve the administrative process.

The Section urges the Social Security Administration (SSA) to withdraw and reconsider these proposed regulations insofar as they impose on SSA Administrative Law Judges (ALJs) the requirement to obtain prior approval of the agency before engaging in outside teaching, speaking, writing, lecturing, or participating in non-profit charitable, religious, professional social or civic organizations related to the activities of the agency. Our reasons are set forth below.

We do appreciate that outside activities that substantially divert ALJs from their duties may be prohibited, in order that SSA ALJs will be full-time adjudicators. Likewise, we understand that prior notification may be appropriate when the ALJ is called upon to render professional or consultative services relating to the activities of the agency or to assist in the preparation of a grant application, contract proposal or program report to the SSA. These activities raise questions about the impartiality and objectivity of the ALJs, particularly when they are compensated or otherwise rewarded.

Nevertheless, our Section maintains that the prior approval requirement for teaching, speaking and writing, unnecessarily and excessively regulates the outside activities of SSA ALJs. Of note, 5 CFR § 2635.807 already regulates the compensation agency employees may receive from teaching, speaking and writing related to the employee's official duties, so that the pre-approval process merely adds an additional and burdensome requirement to ALJ participation in outside activities in which the ALJ has no significant financial interest. The Section's concerns about the over-regulation of outside activities are consistent with the more detailed analysis and recommendations of *The Report of the ABA Committee on Government Standards*, produced by a bi-partisan, blue ribbon committee after detailed study of the issue. The Report is reprinted at 45 Admin. L. Rev. 287 (1993).

We believe that ALJs should be encouraged to undertake teaching, speaking and editorial work so they may share their experience and insight about government and about Social Security. They should be able to make critical comments about their own agency in professional venues devoted to the improvement of the administrative process and law.

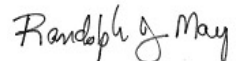
Our Section has valued the input of SSA ALJs and other ALJs and state and federal administrative judges in our own deliberations. These judges have made valuable contributions to our substantive recommendations for improvements in administrative process throughout government. All participants, including ALJs, benefit from the broader perspectives gained from discussing the major issues in administrative law. It would be unfortunate if the ALJs' contributions, and the benefits gained by all, were limited by unnecessarily strict prior approval requirements.

In our view, First Amendment considerations are relevant as well. The free speech rights of ALJs should not be diminished by imposing prior restraints or other forms of censorship on ALJs. Any pre-approval process must not censor, or appear to censor, views with which the agency may disagree. ALJs should be encouraged, not discouraged, from joining or being active as volunteers in professional organizations even if that organization might be seen as somehow relating to their official duties.

Finally, the Section is concerned that the proposed process for obtaining approval is inadequate and may operate to preclude ALJs from participating in otherwise unobjectionable activities. First the proposed regulation does not require the agency to respond promptly to the request, so mere delay is dispositive of a request. A timely response to an invitation to participate in the educational and professional activities of our Section is essential to our scheduling and the same is typically true of similar organizations. Second, the standard for approval "that the activity is not expected to involve conduct prohibited by statute or federal regulation" is vague and subjective in that it rests upon the expectation of the reviewer. There should be a presumption speaking, teaching and writing is appropriate and to be encouraged when it is consistent with existing regulations.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

A handwritten signature in cursive script that reads "Randolph J. May".

Randolph J. May
Section Chair